NO. 22135

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERALD GLEN BOYDEN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

STATEMENT OF JURISDICTION

Appellant was indicted by the Federal Grand Jury for the Southern District of California, Central Division for violation of Title 18, United States Code, Section 2113(a)(d) armed robbery of a national bank, on January 20, 1965 [Boyden v. United States, 363 F. 2d 551 (9th Cir. 1966)].

Following a jury trial, appellant was convicted and his conviction was affirmed on appeal [Boyden, Id.].

Appellant filed the subject Section 2255 motion on July 7, 1967 [C. T. 3].[1/] On July 7, 1967, an Order Denying Petition was

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1/ C. T. refers to Clerk's transcript.

filed by the Court [C. T. 5].

Appellant filed, on July 18, 1967, a Notice of Appeal from the above order [C. T. 9].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2113(a)(d) and 3231, and Title 28, United States Code, Section 2255.

This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291, 1294, and 2295.

II

STATUTES INVOLVED

Appellant's motion, the denial of which is the basis of the instant appeal, was brought under the provisions of Title 28, United States Code, Section 2255, which, in pertinent part, provides:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . ., or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the sentence . . .
>
> "An appeal may be taken to the Court of appeals

from the order entered on the motion as from a final judgment or application for a Writ of Habeas Corpus . . . ."

III

STATEMENT OF THE CASE

A. QUESTIONS PRESENTED.

1. Whether a point may be raised for the first time on appeal.

2. Whether the rule of Wade v. United States, 388 U. S. 218 (1967), is retroactive.

3. Whether appellant could have been compelled to make statements of a non-testimonial nature and wear articles of clothing in a lineup.

B. STATEMENT OF FACTS.

The facts of this case were reviewed by this Court in the direct appeal from the conviction [Boyden, supra].

IV

ARGUMENT

A. APPELLANT CANNOT RAISE A POINT ON APPEAL NOT RAISED BEFORE THE DISTRICT COURT.

Appellant, in his Opening Brief, challenges the holding of a preliminary hearing, alleged used as a lineup, without providing him counsel. Such point was not raised before the District Court, and cannot be raised in this Court, Standley v. United States, 318 F. 2d 700 (9th Cir. 1963), cert. denied, 376 U.S. 917 (1964), reh. denied, 376 U.S. 967 (1964).

B. THE RULE OF WADE v. UNITED STATES, IS NOT RETROACTIVE TO TRIALS HELD BEFORE JUNE 12, 1967.

Appellant's Opening Brief is concerned with skirting the holding of Stovall v. Denno, 388 U.S. 293 (1967), as cited in Judge Curtis' order denying the instant motion. The rule of Stovall is clear, in that the Wade rule affects at p. 296 "only those issues and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after this date" [June 12, 1967].

C. APPELLANT'S RIGHTS WERE NOT VIOLATED BY HAVING HIM WEAR ARTICLES OF CLOTHING OR UTTER STATEMENTS OF A NON-TESTIMONIAL NATURE.

Wade, supra, at pages 222-223 makes it clear that a person in a lineup, even after Wade, may be compelled to put on articles of clothing, and make statements of a non-testimonial nature.

V

CONCLUSION

In short, appellant cannot, at this point, challenge any lineup in which he may have appeared. The judgment of the District Court should be affirmed for the reasons stated in Judge Curtis' order denying relief.

Respectfully submitted,

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United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald Morrow

RONALD MORROW

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/s/ Ronald Morrow

RONALD MORROW